Capital punishment again a possibility for Carnation slayings defendants

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SEATTLE — The state Supreme Court on Thursday was asked to decide whether a federal ruling must be applied to the way prosecutors in Washington go about seeking the death penalty against defendants charged with aggravated first-degree murder.

It's the third time the justices have heard oral arguments on a question of capital punishment in the case against Joseph McEnroe and Michele Anderson, who are each accused of killing six members of Anderson's family on Christmas Eve 2007 in Carnation.

In addition to weighing arguments about whether the absence of sufficient mitigating circumstances to warrant a life sentence instead of death is a "fact" or element of the crime that must be proved to a jury, the justices were also asked by King County prosecutors to replace Superior Court Judge Jeffrey Ramsdell — who has presided over the case for 6½ years — with a new trial judge.

In January, Ramsdell agreed with the defense that "the absence of sufficient mitigation is an element of the crime for which death is the mandatory punishment." But he said tossing out the death penalty was premature. He conceded he didn't know how to proceed, prompting the state to ask the Supreme Court to weigh in on the matter.

Thursday's hearing revolved around a federal robbery case known as Alleyne v. United States, in which the U.S. Supreme Court determined that any fact that can increase a defendant's mandatory minimum sentence is an "element" of the crime and must be alleged in charging documents.

Kathryn Ross, one of McEnroe's defense attorneys, argued that the punishment for premeditated murder is life in prison without the possibility of parole. To increase that punishment to death, she said prosecutors must not only prove there were aggravating circumstances to warrant death, but also that there is an absence of sufficient mitigating evidence to justify a life sentence.

"The information has to contain all the elements of the crime," she said.

But King County Senior Deputy Prosecutor James Whisman told the court that for something to be an element of a crime, "it has to be proved beyond a reasonable doubt to a jury." While the state "has to

prove aggravating factors” in a capital case, “we don’t have to prove a negative,” he said, referring to the absence of mitigating evidence.

He noted that prosecutors have charged both McEnroe and Anderson with six counts of first-degree murder, as well as two aggravators: more than two people were killed as part of a common scheme or plan and two of the victims were killed to eliminate witnesses.

Those charges made them “eligible” for the death penalty, and were followed up with a special notice advising them that Prosecutor Dan Satterberg would be seeking the death penalty, Whisman said. But it will be up to a jury to decide what penalty McEnroe and Anderson face.

“Every single jury across the land ... has to ultimately make this decision,” he said. “And that is, considering everything we’ve heard before, the facts of the crime, including the aggravating circumstances and whatever mitigating circumstances are presented, does this defendant deserve the penalty of death or not?”

Justice Charles Johnson questioned how the state would meet “whatever burden that factual determination” of absence of mitigation would require, especially if the defense didn’t present any mitigating evidence to a jury.

Ross, the defense attorney, replied that the state “would have to have some facts” showing insufficient mitigation but acknowledged the Legislature “may have to retool” the law since applying the Alleyne decision may not fit with the state’s current death penalty procedures.

Chief Justice Barbara Madsen expressed concern about “the nature of the jury’s decision-making,” saying, “it’s not just about facts, it’s also about mercy and other non-quantitative factors the jury has a right to consider.”

Ross answered: “That isn’t really the point from the defense side. The point is what the state has to allege ... Just because there may be evidence from the defense side doesn’t change at all what the state’s requirements are in charging.”

As for replacing Ramsdell, Whisman said the prosecution has been reluctant to criticize him but are troubled by the “overall management” and slow pace of litigation, as well as “the perception of justice and timely justice in this case.”

Most of Ramsdell’s rulings have “been dealing with death penalty litigation previously decided” by the state Supreme Court, he said.

“The judge is exhibiting a bias against the death penalty — that’s what I see when I read between the lines of the state’s argument,” said Madsen, adding that if the state is correct, “hostility toward the death penalty” could be considered a basis for removal.

Justice Sheryl Gordon McCloud, noting that there has been a “very difficult and challenging line of cases to weave into our state law,” asked Whisman: “Don’t you think there are difficult and challenging issues the trial court has been dealing with?”

Whisman answered that in January 2013, Ramsdell issued an order that “cut the legs out from under the state” when he ruled that Satterberg erroneously considered the strength of the evidence against McEnroe and Anderson in seeking the death penalty — a decision later overturned by the Supreme Court.

At that point, prosecutors decided “we’ll zip our lips and not say anything about that,” but then more than a year later “we find ourselves in a situation like this” where the ruling by Ramsdell on the Alleyne question has resulted in another months-long delay, Whisman said.

Lila Silverstein, an attorney representing the Washington Association of Criminal Defense Lawyers, argued against replacing Ramsdell to “protect the integrity of the system and judicial independence.” She said it was not an appropriate question for the justices, saying prosecutors should have first filed a recusal motion in Ramsdell’s court to allow him to address their concerns within the context of the code of judicial conduct.